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Supreme Court, U.S.
FILED

(D)

No. 061296

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IN THE
SUPREME COURT OF THE UNITED STATES

ALEJO COVARRUBIAS,
Petitioner
v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional institutions Division,
Respondent

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals misapplied the standard for granting a certificate of appealability after the federal district court erred in concluding that the state court decision that petitioner received the effective assistance of counsel on appeal was not contrary to or an unreasonable application of Supreme Court precedent.

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PETITION FOR A WRIT OF CERTIORARI

Alejo Covarrubias respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Fifth Circuit denying a motion for a certificate of appealability.

OPINION BELOW

The order of the Fifth Circuit denying a certificate of appealability is not reported. (Appendix A).

JURISDICTION

The Court of Appeals denied the motion for a certificate of appealability on December 12, 2006. This petition is being filed within 90 days of that order. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

28 U.S.C. § 2253(c)(1)(A) provides, in pertinent part, "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from – the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . . ."

28 U.S.C. § 2253(c) (2) provides, in pertinent part, "A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right."

STATEMENT OF THE CASE

A. SUMMARY OF THE ISSUE

The jury rejected petitioner's defense that he shot Mendez in defense of Raymundo, convicted him murder, and assessed his punishment at 55 years in prison. The jury acquitted Raymundo on the basis of self-defense, establishing that the homicide was justified. Direct appeal counsel in state court failed to raise whether the evidence was legally insufficient to sustain petitioner's murder conviction where the jury found that the co-defendant lawfully killed the deceased in self-defense. Had appellate counsel raised this issue, there is a reasonable probability that a state appellate court would have reversed petitioner's murder conviction and entered a judgment of acquittal. Petitioner urges below that jurists of reason could disagree with the federal district court's resolution of his constitutional claim or that jurists could conclude the issue presented is adequate to deserve encouragement to proceed further. The Court of Appeals misapplied the standard upon denying petitioner a certificate of appealability.

B. STATEMENT OF FACTS

Petitioner and his brother, Raymundo Covarrubias, were at a bar in Houston on the night of December 6, 1997. They argued with some people as they were leaving in their respective vehicles. According to Edmundo Tijerina, the owner of the bar, petitioner got out of his truck carrying a gun, walked to a truck driven by Rosendo Rodriguez, and tapped on the window with the gun. Petitioner then saw Raymundo fighting with Rogelio Mendez in the parking lot, ran toward them, and fired once at Mendez, who was standing. Mendez fell to the ground, pulling Raymundo with

him. Raymundo took a knife from his jacket pocket and began stabbing began stabbing Mendez as they fought on the ground. Petitioner shot Mendez as he lay on his back and then grabbed him by the hair and shot him in the head at close range.

Petitioner testified that, while he was talking to Rodriguez, he saw two men running toward his truck; the closest man, Mendez, grabbed Raymundo and hit him in the head, knocking him to the ground. Mendez sat on top of Raymundo, hitting him. Petitioner retrieved a gun from his truck and shot Mendez.

Dr. Tommy Brown, a pathologist, testified that Mendez had been stabbed eight times; a stab wound to his spleen was fatal. Mendez had been shot in the upper back, upper abdomen, and forehead; the latter two wounds were also fatal. The stab wound to the spleen was sufficient to cause death even had Mendez not been shot.

The court instructed the jury on self-defense as applied to Raymundo and on defense of a third person as applied to petitioner. The jury acquitted Raymundo on the basis of self-defense but convicted petitioner of murder.

C. PROCEDURAL HISTORY

Petitioner was charged with murder in state court. Petitioner's brother, Raymundo Covarrubias, was charged with the same murder. They pled not guilty and were tried together in the 183rd District Court of Harris County, Texas. The jury acquitted Raymundo on the ground of self-defense, convicted petitioner, and assessed his punishment at 55 years in prison.

The Fourteenth Court of Appeals of Texas affirmed petitioner's conviction in an unpublished opinion issued on August 31, 2000. The Texas Court of Criminal Appeals refused discretionary review on February 7, 2001.

Covarrubias v. State, No. 14-99-459-CR (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). The same lawyer represented petitioner at trial and on appeal in state court.

Petitioner filed a state habeas corpus application on April 11, 2002. The state district court, without an evidentiary hearing, recommended that relief be denied. The Texas Court of Criminal Appeals denied relief without written order on November 10, 2004. Ex parte Covarrubias, No. WR-58,237-01 (Tex. Crim. App. 2004).

Petitioner filed a federal habeas corpus petition on November 24, 2004. The district court denied relief and a certificate of appealability on March 9, 2006. Covarrubias v. Dretke, 2006 WL 623573 (S.D. Tex. 2006). The United States Court of Appeals for the Fifth Circuit denied petitioner's motion for a certificate of appealability on December 12, 2006.

REASONS FOR GRANTING THE PETITION

The Court of Appeals misapplied the standard for granting a certificate of appealability after the federal district court erred in concluding that the state court decision that petitioner received the effective assistance of counsel on appeal was not contrary to or an unreasonable application of Supreme Court precedent.

A defendant may not appeal a final order in a 28 U.S.C. § 2254 proceeding unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c) (1) (A). To obtain a certificate of appealability, the defendant must make a "substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253 (c) (2). The defendant must demonstrate that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. Miller-El v.

Cockrell, 537 U.S. 322, 327 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000).

In determining whether to grant a certificate of appealability, the district court and court of appeals are limited to a threshold inquiry into the underlying merit of the defendant's claims. Miller-El, 537 U.S. at 327. The threshold inquiry does not require full consideration of the factual and legal bases adduced in support of the claims. Instead, the determination is based on an overview of the claims in the habeas petition and a general assessment of their merits. Id. At issue is the debatability of the underlying constitutional claim, but not the resolution of that debate. Miller-El, 537 U.S. at 342. A claim can be debateable even though every jurist of reason might agree, after the certificate has been granted and the case has received full consideration that the petitioner will not prevail. Miller-El, 537 U.S. at 338.

An appellant in a criminal case is entitled to the effective assistance of counsel on appeal. U.S. CONST. amends.VI and XIV; Evitts v. Lucey, 469 U.S. 387, 394-396 (1985). The standard of Strickland v. Washington, 466 U.S. 668 (1984), which requires a showing of deficient performance and prejudice, applies in the appellate context. Smith v. Robbins, 528 U.S. 259, 285 (2000). Thus, petitioner must show that appellate counsel unreasonably failed to raise an issue that would have resulted in reversal of the conviction. Id. at 285. Counsel is not required to raise a nonfrivolous issue that, in his professional judgment, will not result in reversal of the conviction. Jones v. Barnes, 463 U.S. 745, 751 (1983).

Petitioner's state appellate counsel provided an affidavit in the state habeas proceeding admitting that he did not consider or research the issue which petitioner now maintains he should have raised on appeal. Thus, petitioner

is entitled to an out-of-time appeal if there is a reasonable probability that a state appellate court would have reversed the conviction had this issue been raised.

The Fourteenth Amendment Due Process Clause of the United States Constitution requires the reversal of a conviction based on legally insufficient evidence. Jackson v. Virginia, 443 U.S. 307 (1979). Petitioner's murder conviction violated due process because the jury finding that the homicide was justified meant that no crime was committed. Stated otherwise, petitioner could not properly be convicted of murdering a man who was lawfully killed by the co-defendant. The district court rejected this argument for three reasons; none can withstand scrutiny or should have served as the basis for the court of appeals to deny a certificate of appealability.

The district court first found that the record does not establish that the jury necessarily acquitted Raymundo on the basis of self-defense; the jury could have decided that the State simply failed to prove beyond a reasonable doubt that Raymundo killed Mendez. On the contrary, Raymundo testified that he repeatedly stabbed Mendez, and the pathologist testified that the stab wound to Mendez's spleen was sufficient to cause death even had he not been shot. Furthermore, Raymundo's counsel argued during summation that Raymundo was defending himself when he stabbed Mendez—that Raymundo was in danger from an attack by Mendez; could not retreat because Mendez, who was 30 pounds heavier, was on top of him; and that the stab wounds all over Mendez's body were consistent with "defensive, glancing blows" to get Mendez off of him. Had the jury not believed that Raymundo acted in self-defense, it would have convicted him of murder under the law of parties, even if it rejected the pathologist's opinion that the stab wound to the spleen was fatal. Thus, the only logical conclusion is that the

acquittal was based on self-defense.[1]

The district court next found that the jury could have decided that Raymundo was justified in defending himself but that petitioner was not justified in defending Raymundo; that is, that the defenses of self-defense and defense of a third person are mutually exclusive. Obviously, that is exactly what the jury decided. However, that begs the question, which is whether it is constitutionally permissible to uphold the murder conviction of a person who used deadly force to defend another person who lawfully had the right to defend himself.

Finally, the district court concluded that, even if the jury acquitted Raymundo on the basis of self-defense, that verdict does not legally require petitioner's acquittal; that is, there is no constitutional violation rooted in inconsistent verdicts. Therein lies the ultimate question. Raymundo's acquittal on the basis of self-defense established that the homicide was legally justified. A judicial determination that Raymundo had a right to kill Mendez renders the evidence insufficient to sustain petitioner's murder conviction.

"Where the commission of a single crime is charged, it is clear that a jury cannot acquit the principal and yet find his co-defendant guilty of being an accessory to the commission of the crime it found had not been committed." People v. Allsip, 74 Cal. Rptr. 550, 551 (Cal. App. 1969). In Allsip, two defendants were tried together for rape and aiding and abetting each other. The co-defendant was acquitted of both counts; the defendant was acquitted of rape but convicted of aiding and abetting the co-defendant. The conviction for aiding and abetting was reversed because the jury, by acquitting the co-defendant, determined that no rape

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[1] Petitioner could not present affidavits or testimony from the jurors to explain the reason for the acquittal, as Texas Rule of Evidence 606(b)—like its federal counterpart—prohibits the admission of a juror's testimony or affidavit regarding the basis for a verdict.

had occurred.

The district court acknowledged that Raymundo's acquittal for stabbing Mendez could, under Allsip, possibly call into question a conviction of petitioner for aiding and abetting Raymundo, but Allsip was distinguishable because petitioner personally shot Mendez. The district court's rationale is questionable. If a defendant's conviction cannot be upheld for aiding and abetting a crime that the jury determined the co-defendant did not commit, a defendant's conviction cannot be upheld for murder when the jury determined the co-defendant lawfully killed the deceased in self-defense.[2]

Self-defense and defense of a third person are harmonious, mutually consistent defensive theories, as "a finding that one had killed the victim in justification or self-defense would acquit the other as well." State v. Snodgrass, 346 N.W.2d 472, 477 (Iowa 1984). The district court concluded that petitioner's reliance on Snodgrass was misplaced because that court was addressing whether a joint trial would prejudice the defendants rather than the constitutionality of a conviction of one defendant for murder where the jury acquitted the co-defendant on the basis of self-defense. However, the rationale of the Snodgrass Court is unassailable.

Petitioner recognizes that this Court has never required consistent verdicts. See Hamling v. United States, 418 U.S. 87, 101 (1974). However, petitioner's case is not about inconsistent verdicts—it is about whether a defendant

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[2] Johnny Holmes, the long-time former district attorney of Harris County, was often asked by the media to explain why police officers, purportedly acting in self-defense, could lawfully shoot an unarmed man multiple times, especially after reloading their weapons. Holmes would always reply, "An analogy that I use is that if it is okay to kill a guy dead, it is okay to kill him dead, dead, dead." Alan Bernstein, *Holmes often a blunt instrument of the law*, Houston Chronicle, Section A at 25 (October 13, 1999).

can properly be convicted of murdering a man who was lawfully killed by the co-defendant. Because the pathologist testified that the stab wound to the spleen inflicted by Raymundo was sufficient to cause death even had Mendez not been shot, and the jury found that Raymundo lawfully killed Mendez in self-defense, petitioner committed no crime by shooting, in essence, a man lawfully killed by another. He would have been entitled to an acquittal had appellate counsel raised this issue.

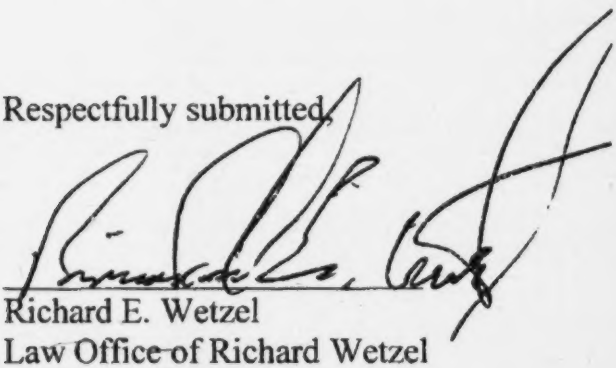
The state court decision that appellate counsel was effective was contrary to Smith v. Robbins, supra, and Evitts v. Lucey, supra, and constituted an unreasonable application of Jones v. Barnes, supra. The district court erroneously found otherwise upon denying federal habeas corpus relief and a certificate of appelability.

Petitioner urges that jurists of reason could disagree with the district court's resolution of his constitutional claim or that jurists could conclude the issue presented is adequate to deserve encouragement to proceed further. The Court of Appeals denial of a certificate of appealability is contrary to and a misapplication of Miller-El v. Cockrell, supra, and Slack v. McDaniel, supra.

CONCLUSION

Petitioner requests that this Court grant the petition for a writ of certiorari, vacate the order of the Fifth Circuit, and remand to the Fifth Circuit for consideration of the claim presented concerning the denial of the effective assistance of counsel on direct appeal.

Respectfully submitted,



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APPENDIX

Appendix A

Order of the United States Court of Appeals
For the Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-20279
USDC No. 4:04-CV-4488

ALEJO COVARRUBIAS,

Petitioner-Appellant,

versus

U.S. COURT OF APPEALS
FILED
DEC 12 2006
CHARLES R. FULBRUGE III
CLERK

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent-Appellee.

Appeal from the United States District Court
For the Southern District of Texas

O R D E R :

Alejo Covarrubias seeks a certificate of appelability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2254 petition challenging his murder conviction. He argues that counsel was ineffective for failing to argue on direct appeal that the evidence was insufficient to support his conviction where the jury found his codefendant not guilty on the same charge.

Covarrubias has not shown "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." See Slack v.

McDaniel, 529 U.S. 473, 484 (2000). His motion for COA is DENIED.

/s/ Rhesa H. Barksdale
RHESA H. BARKSDAL
UNITED STATES CIRCUIT JUDGE